United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1424

To be argued by
Herbert B. Halberg.

ORIGINAL

United States Court of Appeals

For the Second Circuit.

JAMES CASHIN, as Secretary-Treasurer of Local 1804-1, International Longshoremen's Association (A.F. of L.-C.I.O.), on behalf of and for the benefit of its Members,

Plaintiff-Appellant,

against

WM. SPENCER & SON CORPORATION,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-8076—1974

Table of Contents.

TABLE OF CASES.

AUTHORITIES.

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Preliminary Statement.

Plaintiff-appellant (hereinafter referred to as Cashin) appeals from an order of the Hon. Harold R. Tyler, Jr., granting defendant-appellee (hereinafter referred to as Spencer) summary judgment dismissing plaintiff's complaint.

Suit was commenced by Cashin for the benefit of its members in Supreme Court, New York County (subsequently removed to the United State District Court for the Southern District of New York by application of Spencer on the ground that the United States District Court had jurisdiction under Sec. 301 [a] [b] and [c] of the Labor Management Relations Act of 1947, 29 U.S.C. Section 185 [a] [b] and [c]), seeking to recover from Spencer alleged unpaid contributions to the Union welfare plan in the amount of $144,000, as well as the sum of

$114,361.60 allegedly due and owing from Spencer for paid holidays (46a-50a).*

During the course of oral argument on this motion before the court on November 9, 1973, counsel for Cashin abandoned its claim for contribution due to the welfare plan in the amount of $144,000 (38a). At the close of argument on November 9, 1973, the court below, on its own initiative, granted counsel for Cashin an indeterminate amount of time ("as promptly as possible") to submit additional evidentiary data and/or affidavits to bolster its argument in opposition to Spencer's application for summary judgment. No supporting additional factual material was ever submitted by Cashin, and on January 31, 1974, the court below by memorandum decision granted summary judgment in favor of defendant Spencer dismissing the plaintiff's complaint (37a-42a).

The Issue.

Did the court below correctly find that there was no genuine issue as to any material fact and properly grant summary judgment dismissing plaintiff's complaint?

The Facts.

This action has as its basis a collective bargaining agreement entered into between Cashin as representative of laborers in New York Harbor known as Chenangoes, and the Harbor Carriers of the Port of New York which represented the employers hiring Chenango labor. The appellee, Wm. Spencer & Son Corporation, was for a number of years the largest employer of Chenango labor on the New York waterfront, and during the life of the collective bargaining agreement upon which this action is

*References to the Appendix are designated by page number followed by letter "a".

based, from October 1, 1968 tc September 30, 1971, was the last employer of Chenango labor. Spencer, in fact, was completely out of the stevedoring business, which required Chenago labor, by September 30, 1971, when its contract with the Union expired (5a).

The Chenangoes were casual longshore workers who were employed on a day-to-day basis, engaged in the loading and unloading of non-self-propelled barges and lighters in the Port of New York. The term originally derived from the Chenango Indian laborers in upper New York State who assisted in similarly loading and unloading barges and lighters along the Erie Canal in earlier days. Employment was never certain in this trade, and men were called upon to work only as the need arose, i. e., when loading or unloading work was required to be performed. Thus, employment was highly irregular (4a-6a).

This background of the inherently casual nature of the Chenangoes' employment is relevant in understanding the basis for many of the provisions in the collective bargaining agreement entered into between the Union representing the Chenangoes and the Harbor Carriers of the Port of New York, representing the group of employers hiring Chenango labor. The contract was entered into for a three-year period commencing October 1, 1968, and ending September 30, 1971 (12a-26a), and was amended on February 23, 1970 (27a-29a).

The relevant portions of the collective bargaining agreement relating to paid holidays is contained in Paragraph 7 of the agreement (19a), as amended on February 23, 1970 (27a). There is no controversy between the parties as to what this relevant provision of the contract provides. The material portion of Paragraph 7, as amended, provides:

> "Such paid holidays shall be granted to regular employees (defined as employees who have worked not less than 570 hours for one employer herein in the fiscal year ending September 30th of the year preceding the year in which the holiday falls) who work for the same employer not less than 4 hours in the work week in which the holiday falls; such 4 hours to include any time worked on the holiday" (27a, 28a).

It is clear from a reading of the contract that there were two conditions to be met which would qualify an employee's claim to compensation for a paid holiday. First, he must have worked not less than 570 hours for one employer in the fiscal year ending September 30th of the year preceding the year in which the holiday falls. And, secondly, he must work for the same employer not less than four hours in the work week in which the holiday falls. Being cognizant of the casual and irregular employment involving this industry, the collective bargaining agreement was drafted in this fashion. It in effect required an absolute minimum of employment by an employee to permit him to qualify for a paid holiday. Using a 40-hour week basis, 570 hours in the preceding year would be equivalent to approximately 14 weeks employment, while four hours of work in the work week in which the holiday falls is but ten percent of a 40-hour work week.

Employment in the industry had contracted quite sharply during the preceding years such that, as noted above, Spencer became the sole employer of Chenango labor during the period of this contract (October 1, 1968 to September 30, 1971), and finally was compelled by economic business considerations to leave the business entirely at the termination of the collective bargaining agreement, September 30, 1971 (5a, 30a). This sharp contraction of employment led to the amendment of the collective bargaining agreement executed on February 23,

1970, reducing the work requirement during the work week in which the holiday falls from 10 hours to 4 hours (19a, 28a). Nonetheless, there still was retained a requirement of employment during the work week in which the holiday fell. The language to this effect in the collective bargaining agreement is clear, plain, and unambiguous.

Cashin's contention in its statement pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York was that there was a genuine issue of material fact as to whether Spencer had paid the appellant's members their holiday benefits accrued pursuant to the collective bargaining agreement between the parties.

Spencer's position in the court below was that since it was not disputed that for valid economic reasons it had gone entirely out of the business in which it could use Chenango labor prior to the expiration date of the collective agreement sued upon, and since the claims for holiday benefits relate entirely to holidays occurring after it had completely gone out of this business, and after the collective agreement sued upon had expired, there is no basis in the collective agreement for the assertion of the claims. Thus, Spencer contended that a contract condition precedent to entitlement, namely, that the persons asserting the claims to holiday pay had not worked four hours in the work week in which a holiday fell as the expired collective agreement had explicitly required, had not, and could not, be met. Therefore, the crux of this appeal by Cashin, as well as the action in the court below, rests upon the language of the collective bargaining agreement.

POINT ONE.

Absent an ambiguity, the words in a collective bargaining agreement will be given their plain, clear, and ordinary meaning.

The issue before the court below was limited to whether, pursuant to the collective bargaining agreement between the parties, the appellant employees were entitled to paid holidays for the period between October 1, 1971 and September 30, 1972 (36a*).

The relevant portion of the collective bargaining agreement, as amended, with respect to paid holidays stated, as we noted, *supra*:

> "Such paid holidays shall be granted to regular employees (defined as employees who have worked not less than 570 hours for one employer herein in the fiscal year ending September 30th of the year preceding the year in which the holiday falls) who work for the same employer not less than 4 hours in the work week in which the holiday falls; such 4 hours to include any time worked on the holiday" (27a, 28a).

The language used in the collective bargaining agreement is clear on its face and is unambiguous. It is evident from the contract that there are dual requirements which must be met to enable a *regular* employee to be eligible to be granted a paid holiday:

1. Employment by an employer for not less than 570 hours in the year *preceding* the year in which the holiday falls.

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*Appellant's statement pursuant to Rule 9(g) of the General Rules of the District Court also raises a question with regard to welfare benefits but same was withdrawn during oral argument.

2. Employment by the *same* employer for not less than four hours in the work week in which the holiday falls. (Italics ours.)

The court below, in a well-reasoned opinion, found the words used in the collective bargaining agreement clear and unambiguous, and applied the common and normal meaning to them in granting summary judgment dismissing appellant's complaint. The court below furthermore invited appellant to submit additional evidentiary material, if it had any such proof, to show that the parties to the contract intended something other than what they had expressed in the relevant clause of the collective bargaining agreement. No additional affidavits or supporting documentation was forthcoming. *17A C.J.S. Contracts* §*301.*

The basic canon of construction is that the words of a contract should be given their clear, plain, and ordinary meaning absent a patent ambiguity or extrinsic evidence showing a contrary intention. *Independent Oil Workers at Paulsboro, N.J., v. Mobil Oil Corporation* (3d Cir., 1971) 441 F. 2d 651.

The statement of the court in *Local 368, United Fed. of Eng., etc., v. Western Electric Co.* (D.C. N.J., 1973) 359 F. Supp. 651 at page 656, recognizes that this fundamental rule of construction applies to labor contracts:

> "* * * A collective bargaining agreement is not an ordinary contract; it is intended to cover the whole employment relationship * * * Nonetheless, general canons of contractual construction and interpretation are not to be renounced in arriving at the parties' intended meaning as expressed therein in such an agreement."

The provision of the contract between Cashin and Spencer in regard to paid holidays is not ambiguous. Its meaning is crystal clear and cannot support the claim asserted in the complaint. Even if it could be argued that the contract wording on holiday pay is ambiguous, there is nothing in the background of this agreement which in any way supports a contention that the words used mean anything but what they say. The contract speaks for itself, and its application to the undisputed facts can lead to no conclusion other than that there is no merit to appellant's position.

Cashin in its brief spends considerable time alluding to a prior course of dealing and speaks of a conflict of facts. Nevertheless, nowhere in its papers in opposition to appellee's motion for summary judgment is there any evidentiary material showing that there was any dispute as to the facts. Cashin's papers opposing Spencer's motion for summary judgment are replete with conclusions having no evidentiary force (33a-35a). Neither was there any factual material submitted which raised a question of fact as to whether the intention of the parties was contrary in any respect to the plain and clear meaning of the language of the collective bargaining agreement.

Cashin's basic assertion in the court below, as in its brief before the court, is that an employee has a vested right to paid holidays whether or not he is employed in the year in which the holidays falls so long as he has worked 570 hours in the preceding year. This assertion ignores the second requirement for entitlement to holiday pay contained in the collective bargaining agreement, namely, that an employee must work for the same employer not less than 4 hours in the work week in which the holiday falls. If Cashin's argument were carried to its conclusion, an employer in this industry would be liable for holiday pay for every employee who had worked 570

hours for such employer in the preceding year, whether or not such employee had ever been employed in the year for which holiday pay is claimed. Such a suggestion is wholly illogical. The terms of the collective bargaining agreement providing for holiday pay speak for themselves and are plain, clear and unambiguous, and do not even remotely support the position adopted by appellant.

POINT TWO.

Summary judgment is the proper remedy where there is no genuine issue as to any material fact.

The instant action falls squarely within the purview of Rule 56 of the Federal Rules of Civil Procedure. The purpose of the summary judgment procedure under Rule 56 is to expedite the disposition of actions in which there is no genuine issue of fact requiring trial. *Hooker v. New York Life Insurance Co.* (D.C., N.D., Ill., 1946) 66 66 F. Supp. 313.

No material fact that is the subject of a genuine dispute was raised by Cashin either in its pleadings or in the affidavit submitted in opposition to the motion for summary judgment. *Rule 56(c), Federal Rules of Civil Procedure.*

Rule 56(c), *supra,* states in part as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

No issue of fact is presented by the clear and unambiguous words of the collective bargaining agreement. Nor has Cashin raised any issue of fact in its pleadings or opposing papers requiring adjudication by a trial court. There is merely an assertion that there is a conflict of facts and a prior course of dealing between the parties raising triable issues of fact. But nothing is substantiated—not one scintilla of evidence was offered to buttress that assertion. The remedy of summary judgment was instituted to avoid just such unsubstantiated allegations and cut through pleadings which raise issues that are in fact sham. *Engl v. Aetna Life Insurance Co.* (2d Cir., 1943) 139 F. 2d. 469.

CONCLUSION.

The court below properly granted summary judgment dismissing the complaint of plaintiff-appellant, and the judgment of the court below should be affirmed in all respects.

Respectfully submitted,

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D STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

of Service by Mail

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HIN, as Secretary-Treasurer of Local 1804-1,
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Defendant-Appellee,,.

AFFIDAVIT OF SERVICE BY MAIL

lew York, County of New York ss.:

Harold Dudash

sel, Beck & Halberg , being duly sworn deposes and says that he is the attorney for the above named Defendant-Appellee herein. That he is over 21 years not a party to the action and resides at 2530 Young Avenue, Bronx, N.Y.

e 25th day of September , 19 74 , he served the within Brief for Defendant-Appellee

upon Rosenthal & Herman,

for the above named Plaintiff-Appellant

three true copies

g of the same securely enclosed in a post-paid wrapper

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Street, New York, New York

the said attorney for the Plaintiff-Appellant

401 Broadway, New York, N.Y.

being the address within the state designated by h for that purpose, or the h then kept an office, between which places there then was and now is a regular on by mail.

fore me, this 25th

ptember 19 74

Roland W. Johnson

Harold Dudash

OLAND W. JOHNSON
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sion Expires March 30, 1975